



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
[Redacted])	ISCR Case No. 14-03794
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Strzelczyk, Esq., and Richard A. Stevens, Esq.,
Department Counsel

For Applicant: Jacob Ranish, Esq.

08/21/2015

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised by drug involvement. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on December 19, 2012. On January 9, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and J (Criminal Conduct). The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on February 3, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 30,

2015, and the case was assigned to me on May 7, 2015. On June 3, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 17, 2015. I convened the hearing as scheduled.

At the hearing, Department Counsel withdrew SOR ¶ 2, cross-alleging the Guideline H concerns under Guideline J. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. AX C and D are decisions of other administrative judges in Guideline H cases. I kept the record open until June 30, 2015, to enable Applicant to submit additional documentary evidence. He timely submitted AX E, which was admitted without objection. DOHA received the transcript (Tr.) on June 25, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶ 1.a in part but denied using marijuana until "at least July 2012" as alleged. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old network engineer employed by a federal contractor since September 2012. He enlisted in the U.S. Air Force after graduating from high school and served on active duty from December 2003 to December 2009, including a five-month deployment to Iraq. (Tr. 21.) He was honorably discharged as a staff sergeant (E-5). He held a security clearance while on active duty.

After Applicant was discharged, he worked for a realty company from December 2009 to May 2010. He began working for a defense contractor in May 2010, but he quit after three months because he disliked the job and the working conditions. He returned to the realty company in August 2010 and worked there until December 2011. He worked in Iraq for a defense contractor from December 2011 to June 2012, when his contract ended. He worked again for the realty company for about six months, until he began his current job. He currently does not hold a security clearance.

When Applicant submitted his security clearance application, he disclosed that he purchased marijuana for personal use and used it "a few times a week" from January 2010 to July 2012. He stated that he used it to relieve mental stress and to "provide solidarity" to a good friend who lost both legs in Iraq and used marijuana to treat chronic pain and phantom-limb syndrome. (GX 1 at 36-37.) His friend committed suicide in the summer of 2012. (Tr. 50.)

When Applicant answered the SOR, he recanted his admission that he used marijuana until July 2012, but he admitted that he used it until October 2011. He stated, "If I listed 2012 as the date of my last usage on my SF-86, it was done only out of an abundance of caution." At the hearing, after extensive questioning, he remembered that his last use of marijuana in late June or early July 2012, when someone passed around

a marijuana cigarette at the memorial service for his friend who committed suicide. (Tr. 50.)

Applicant also testified that his marijuana use was less frequent than he stated in his SCA, and that he used marijuana “a few times a month, if that.” He used it with the wounded veteran, with whom he had grown up, and at parties with a few friends from high school. (Tr. 25-26.) He testified that his purchases of marijuana consisted of contributing money to groups at parties rather than personally buying it from a dealer. (Tr. 41-42.) After his friend’s death, he decided that his high-school friends “were not on a career trajectory that [he] wanted to be associated with. . . . They weren’t going anywhere in life. They were doing the same thing they were doing in high school.” (Tr. 27.)

Applicant testified that he has never used marijuana while on active duty, while working for defense contractors, or while holding a security clearance. He has no desire to use marijuana again. He is willing to undergo drug testing and agree to immediate revocation of his security clearance for any future drug use. (Tr. 28.) He submitted a written statement of intent to refrain from drugs and agreed to immediate revocation of any security clearance for future drug use. (AX E.)

Applicant now handles stress with vigorous physical exercise and his hobby of performing as a stand-up comedian. He is recently married, and his wife would not tolerate his use of marijuana. (Tr. 29.) His family, wife, and current friends are aware of his previous drug involvement. (Tr. 30.)

Applicant presented the testimony of an expert witness, a psychologist who specializes in behavioral pharmacology. He has not examined Applicant, but is aware of the frequency and duration of his marijuana use. His research focuses on addiction and the treatment of addiction. He testified that the epidemiological data shows that 45% to 50% of persons in their 20s have used marijuana. About 9% to 12% of recreational users develop an addictive problem or disorder. Alcohol, cocaine, heroin, and nicotine all have a greater likelihood of lifetime dependence. Generally, a person who has abstained from marijuana for 12 months or longer is considered in full remission or recovery. (AX A; Tr. 54-61.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges that Applicant purchased and used marijuana on various occasions between January 2010 and at least July 2012. The concern under this guideline is set out in AG ¶ 24: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.” Drugs are defined in AG ¶ 24(a)(1) as “[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).”

Applicant's admissions establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially relevant:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶¶ 26(a) 26(b) are established. Applicant's drug involvement was not “infrequent” and it did not occur under circumstances making it unlikely to recur. He used marijuana regularly for two and a half years. However, it is not recent.

There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the evidence. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates

“changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s last use of marijuana was three years ago. He is not and has never been addicted to marijuana. Since July 2012, he has married, found meaningful employment, and made new friends. He no longer associates with his marijuana-using friends from high school. He has stopped drifting from job to job. He is enthusiastic about his new career. He has submitted a statement of intent to refrain from further drug involvement and agreed to revocation of any security clearance if he is involved with drugs.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline H in my whole-person analysis and considered the factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Paragraph 2, Guideline J (Criminal Conduct):

Withdrawn

Subparagraph 2.a:

Withdrawn

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge